

No. 8815

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,

*Appellant,*

VS.

FRANCES HILL,

*Appellee.*

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Upon appeal from the District Court of the United States for the  
Southern District of California, Central Division.

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APPELLEE'S REPLY BRIEF

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FILED

PAUL F. O'BRIEN,



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**APPELLEE'S REPLY BRIEF**

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**STATEMENT OF FACTS.**

This is another "fact" case arising out of a suit at law upon a \$10,000.00 policy of war risk insurance which the insured appellee carried during her service in the Army Nurses Corps during the World War, and upon which policy the premiums were paid until August 31, 1919—about six months after her discharge from the Army.

Appellee served overseas in various Army Hospitals in England where she first incurred the heart trouble and lung

trouble which formed the basis of her suit. The jury by their verdict found as a fact that these diseases rendered her totally and permanently disabled from January 1, 1919.

The assignments of error raise the sole question: Whether there is any substantial evidence to support the jury's verdict and the trial court's action in overruling the defendant's motion for a directed verdict.

The case, which took a full week to try, resulted in a verdict for plaintiff upon somewhat conflicting evidence, the shorthand reporter's transcript containing over 600 pages of testimony and proceedings.

It impresses us that counsel for the appellant are "conveniently brief" in their recitation of the facts in their brief, and as a determination of this appeal on its merits depends upon an examination of the Record to determine if there is *any* substantial evidence to support the verdict, it will therefore be necessary to quote from the Record itself in order to determine if it contains evidence sufficient to justify the verdict.

Counsel for the appellant made and presented a motion for a directed verdict and the trial court, in the exercise of a sound judicial discretion, having considered such motion and the evidence as introduced at the trial and having denied the motion, is a determination by the trial court, as well as by the jury, that the verdict was just and amply supported by the evidence.

### ASSIGNMENTS OF ERROR.

Appellant specifies six assignments of error (R. 338). However, in their brief (page 2) counsel apparently abandon all but the first two assignments, thereby leaving the sole question whether there is any substantial evidence in the record to sustain the jury' verdict.

However, appellant's assignments of error Nos. III, IV and V are without merit.

See

*Corrigan v. United States*, 82 Fed.(2d) 106 (C.C.A. 9);

*United States v. Aspinwall* (No. 8715, C.C.A. 9),  
Decided May 20, 1938.

Appellant's assignment No. VI is likewise without merit.

See

*California Code of Civil Procedure*, Section 580;

*United States v. Rye*, 70 Fed.(2d) 150 (C.C.A. 10);

*Fleischman v. Lotito*, 6 Cal.(2d) 365;

*Manke v. United States* (C.C.A. 9) 38 Fed.(2d) 624.

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### PERTINENT STATUTES AND REGULATIONS INVOLVED.

Pertinent statutes and regulations bearing on the particular point involved in this appeal are as follows:

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

“That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse

Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of \$500, and not less than \$1,000 or more than \$10,000, upon payment of the premiums as hereinafter provided.”

This section was restated in substance in subsequent amendments (Sec. 300 World War Veterans Act, 1924; U. S. C., Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, “permanent and total disability” was defined as follows:

“Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed \* \* \* to be total disability.

“Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. \* \* \*”

In addition Section 19 of the World War Veterans Act as amended (38 U. S. Code, 445), provides that in the event of disagreement between the insured veteran and the government suit may be brought in the district court etc.

## QUESTION PRESENTED.

(With Citations Only)

Is there any substantial evidence to sustain the jury's verdict?

- Parsons v. Bedford*, 3 Peters 433, 7 L. Ed. 732;  
*Corsicana National Bank v. Johnson*, 251 U. S. 68,  
 40 S. Ct. Rep. 82, 64 L. Ed. 141;  
*Gunning v. Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74  
 L. Ed. 721;  
*Lumbra v. United States*, 290 U. S. 551, 54 S. Ct.  
 272, 78 L. Ed. 492;  
*United States v. Aspinwall* (No. 8715, C.C.A. 9),  
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*United States v. Thompson* (C.C.A. 9), 92 Fed.(2d)  
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*United States v. Klener* (C.C.A. 9), 93 Fed.(2d) 15,  
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*La Marche v. United States* (C.C.A. 9), 28 Fed.(2d)  
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*Marsh v. U. S.*, 33 Fed.(2d) 554;  
*United States v. Barker*, 36 Fed.(2d) 556;  
*Hayden v. United States* (C.C.A. 9), 41 Fed.(2d)  
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*United States v. Burke* (C.C.A. 9), 50 Fed.(2d) 653;  
*United States v. Meserve* (C.C.A. 9), 44 Fed.(2d)  
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*United States v. Rasar* (C.C.A. 9), 45 Fed.(2d) 545;  
*United States v. Rice* (C.C.A. 9), 47 Fed.(2d) 749;  
*United States v. Stamey* (C.C.A. 9), 48 Fed.(2d)  
 150;

- United States v. Lawson* (C.C.A. 9), 50 Fed.(2d) 646;
- Sorvik v. United States* (C.C.A. 9), 52 Fed.(2d) 406;
- United States v. Leshner* (C.C.A. 9), 59 Fed.(2d) 53;
- United States v. Dudley* (C.C.A. 9), 64 Fed.(2d) 743;
- United States v. Francis* (C.C.A. 9), 64 Fed.(2d) 865;
- United States v. Burleyson* (C.C.A. 9), 44 Fed.(2d) 868;
- United States v. Todd* (C.C.A. 9), 70 Fed.(2d) 540;
- United States v. Suomy* (C.C.A. 9), 70 Fed.(2d) 542;
- United States v. Kane* (C.C.A. 9), 70 Fed.(2d) 396;
- Vance v. United States* (C.C.A. 7), 43 Fed.(2d) 975;
- Malavski v. United States* (C.C.A. 7), 43 Fed.(2d) 974;
- Ford v. United States* (C.C.A. 1), 44 Fed.(2d) 754;
- United States v. Phillips* (C.C.A. 8), 44 Fed.(2d) 689;
- Barksdale v. United States* (C.C.A. 10), 46 Fed.(2d) 762;
- United States v. Godfrey* (C.C.A. 1), 47 Fed.(2d) 126;
- Carter v. United States* (C.C.A. 4), 49 Fed.(2d) 221;
- Kelley v. United States* (C.C.A. 1), 49 Fed.(2d) 897;
- United States v. Tyrakowski* (C.C.A. 7), 40 Fed.(2d) 766;
- United States v. Storey* (C.C.A. 10), 60 Fed.(2d) 484;
- United States v. Albano* (C.C.A. 9), 63 Fed.(2d) 677;

*United States v. Sorrow* (C.C.A. 5), 67 Fed.(2d) 372;

*United States v. Adams* (C.C.A. 10), 70 Fed.(2d) 486;

*United States v. Anderson*, 70 Fed.(2d) 537;

*United States v. Flippence* (C.C.A. 10), 72 Fed. (2d) 611;

*United States v. Brown* (C.C.A. 10), 72 Fed.(2d) 608;

*United States v. Higbee*, 72 Fed.(2d) 773;

*United States v. Harless* (C.C.A. 4), 76 Fed.(2d) 317;

*Gray v. United States* (C.C.A. 8), 76 Fed.(2d) 233;

*Vietti v. Hines*, 48 Cal. App. 266, 192 Pac. 80.

We submit the jury's verdict is amply supported by substantial evidence as shown by the record.

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#### THE RULE.

Regarding jury trials, almost one hundred years ago Justice Storey of the United States Supreme Court, in *Parsons v. Bedford*, 3 Peters 433, 7 L. Ed. 732, said:

“The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated in and secured in every state constitution in the Union \* \* \*. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was

adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people.”

Probably the leading case in the Federal courts on the quantum of evidence necessary to sustain a jury's verdict is *Gunning v. Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, in which the Court, per Mr. Justice Butler, said (50 S. Ct. 233):

“Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. (Citing cases.) Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citing cases.)”

And the rule regarding the quantum of evidence necessary to sustain a verdict in the Ninth Circuit has been very aptly stated by the late Judge Sawtelle, in our opinion one of the ablest judges ever to have sat on the Circuit Court of Appeals for the Ninth Circuit. In *United States v. Burke*, 40 Fed.(2d) 653, at page 656, Judge Sawtelle said:



“Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit has been definitely settled and almost universally observed. Judge Gilbert, for many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:

‘Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.’

And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. (Citing cases.)”

And in *United States v. Dudley*, 64 Fed.(2d) 743, this Court said:

“The question before us is whether or not this evidence is so substantial as to justify submission of the case to the jury. We do not weigh the evidence; what our verdict would have been as jurymen is immaterial.”

See also the following decisions of this Court:

- United States v. Leshner*, 59 Fed.(2d) 53;  
*United States v. Barker*, 36 Fed.(2d) 556;  
*United States v. Meserve*, 44 Fed.(2d) 549;  
*United States v. Rice*, 47 Fed.(2d) 749;  
*United States v. Stamey*, 48 Fed.(2d) 150;  
*United States v. Lawson*, 50 Fed.(2d) 646;  
*Corrigan v. United States*, 82 Fed.(2d) 106;  
*Hayden v. United States* (C.C.A. 9), 41 Fed.(2d)  
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*Mulivrana v. United States* (C.C.A. 9), 41 Fed.(2d)  
 734;  
*United States v. Rasar* (C.C.A. 9), 45 Fed.(2d) 545;  
*Sorvic v. United States*, 52 Fed.(2d) 406.

See also:

- Corsicana National Bank v. Johnson*, 251 U. S. 68,  
 40 S. Ct. Rep. 82, 64 L. Ed. 141;  
*Vance v. United States* (C.C.A. 7), 43 Fed.(2d) 975;  
*Malavski v. United States* (C.C.A. 7), 43 Fed.(2d)  
 974;  
*United States v. Godfrey* (C.C.A. 1), 47 Fed.(2d)  
 126;  
*Ford v. United States* (C.C.A. 1), 44 Fed.(2d) 754;  
*Carter v. United States* (C.C.A. 4), 49 Fed.(2d)  
 221;  
*Kelley v. United States* (C.C.A. 1), 49 Fed.(2d)  
 897;  
*United States v. Tyrakowski* (C.C.A. 7), 50 Fed.  
 (2d) 766.

Bearing in mind the rule, we now turn to an examination of the record to see if there is any substantial evidence upon which the verdict can be sustained under this rule.

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### ARGUMENT.

THERE IS ABUNDANT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN THE JURY'S VERDICT.

#### Preliminary Statement.

The plaintiff and appellee cannot agree that the statement of facts set forth by counsel for the defendant and appellant in their brief is either fair or accurate. We feel that counsel for the appellant, in setting forth their version of the facts, have utterly disregarded the basic rule of appellate procedure that all conflicts in the evidence are to be resolved in favor of appellee and all reasonable inferences to be drawn therefrom must likewise be resolved in favor of the party in whose favor the jury so found. Applying this rule to the facts we believe the facts as found by the jury to be substantially as follows:

#### Appellee's condition before she went to war.

Plaintiff testified that before the war she was a trained nurse and the Government stipulated that Miss Hill was in good health at the time she entered the Army. (R. 26)

#### What happened to appellee overseas.

Appellee testified (R. 27-30):

“While I was in the service as a nurse in Liverpool at this army hospital under Major Wolfsohn the most unusual thing that happened to me so far as my

health is concerned is that I was working hard. There were 26 of us nurses. We were supposed to have a 500 bed hospital but when the influenza epidemic came along we crowded in patients until we had a thousand patients in a 500 bed hospital and only 26 nurses to take care of that number. We didn't have any extra nurses to take care of this load. There was no place to get extra nurses from. This happened the latter part of September in 1918. We were supposed to be on duty under normal conditions—supposed to work eight hours a day. In October, 1918, at the time of the influenza epidemic after we had begun to receive the influenza patients, we had orders not to go off duty when night came. The beginning of my experience with the flu was on a Sunday morning, and we had orders not to go off duty that night, and I worked 36 hours without going to my room at all, and the food that I ate, I ate while standing up. I didn't sit down during that time. We received these extra patients from the convoy from the States—transport from the States. I was working hard. I had been taking care of tuberculosis and receiving influenza patients and of course we had to put the influenza patients wherever we could find room for them. At that time I was taking care of influenza, also some tubercular still. Concerning the effect this had on me personally—I was working hard. Of course, to begin with, I worked 36 hours without any time off, and then I would have four or five hours, and probably six hours' sleep, and worked the balance of the time. I didn't go to the dining room for my meals; I ate my meals on the ward whenever I had time to eat at my convenience, and of course, the patients were—quite a few of them were delirious and trying to climb out of bed and coughing, and especially one patient that I tried to

hold in bed—I did hold him in bed. He was dying, coughing, and expectorated all over me. He spattered all over my face and glasses and cap. The mask that I was supposed to wear over my nose and mouth had fallen down in my struggle to try to hold him in bed, and I didn't turn loose of the patient, though, so long as he lived. When he quit breathing I took a piece of gauze and Lysol solution and washed off my glasses and my face, washed the pus off my lips, but I had to wear my uniform until such time as I could go off duty and change it. I wore it on and worked with this pus spattered all over me, all over my uniform and cap. The next thing that happened to me that was unusual so far as my health was concerned—I was still working long hours—at least 18 hours a day when I came down with influenza and pneumonia; that was sometime during the first of October. I was treated in my quarters as there was no room in the hospitals for the sick nurses. I was treated in my quarters by Major Wolfsohn. He was present at the time. He treated me personally, he visited me every day. I did not have a nurse to attend me . . . there was no nurse. I took care of myself the best I could. There were 3 of we girls in a small room together—all nurses—all sick. I was the only one that had pneumonia. The others had influenza. We took our own temperatures. My temperature at that time ran about 103 and 104 for about a week or ten days. I was in bed one morning when the doctor called on me, and my temperature was normal and, of course, I had a very bad cough at that time, and I was weak. I took my pulse at that time. I had a rising temperature, my pulse was rapid. I felt weak and bad, but I felt better this Monday morning. One morning when Dr. Wolfsohn called on me, and he asked me if I felt like

dressing myself, and I told him I did. He told me to dress myself that afternoon and if I felt like it to walk out as far as the big gate, which was probably a hundred feet from the front door of the administration building. The nurses' quarters were in the administration building.

I dressed myself and, of course, I really didn't feel like walking out there, but then I was trying to make believe. I walked out to the big gate very slowly, and on my way back I collapsed on the doorsteps. My heart pounded like it would stop. In fact, I think it did stop just for a second. I just collapsed, I was so weak I couldn't get any further. I lay there for a few minutes, and there was a nurse came along and helped me back to my bed—a Miss Ready, one of our nurses there. Then I stayed in bed. I undressed myself and went back to bed, and stayed in bed until the next morning. I went on duty the next morning. I was still awfully weak, my heart pounding every time I would walk. I went on duty just the same, we needed the nurses so badly. The nurses were all working until late at night. After that I stayed on duty for ten days, or a week—I don't remember how long—it was only a short time; but after I had been on duty a day or two I found I was having a rising temperature. I found it was 101, and finally it was 103. This was while I was nursing on these wards. I just turned weak on the ward and I dropped a glass of thermometers and broke the whole business, so I was ordered back to bed then by Dr. Wolfsohn. This time they admitted me to the ward, like they did the other patients. At that time I was treated ten days or two weeks, I believe. Dr. Wolfsohn treated me. He continued to treat me for that time. He wasn't the ward's

doctor. There was another doctor, but Dr. Wolfsohn also visited me at least once a day. After that I felt better. My temperature went down to normal—that is, they found it normal at least. I felt pretty good, then I went back on duty again. I left Europe to come back to the States the latter part of December, 1918. At the time I left England I felt very badly. I coughed all the time; I never felt like getting out of my bed in the morning when I left Liverpool.”

In corroboration of her testimony, her Commanding Officer at Red Cross Army Hospital No. 4, Major (Dr.) Julian M. Wolfsohn (now head of one of the departments at Stanford University Medical School in San Francisco, testified (R. 66-67):

“I met her in Liverpool, England. I was chief of the Medical Service and Commanding Officer of the Red Cross Hospital No. 4 at Liverpool, England, and she was one of my nurses. Of my own knowledge I remember that—in about October, 1918, she was taken sick and I took care of her at that time. She was sick about eleven days with the so-called influenza and had bronchial pneumonia at that time. She was in her quarters for about eleven days. She was not in the hospital the first time. I permitted her to leave her quarters and shortly after she was taken quite sick again with the same thing and I sent her to the hospital where she was under my care and she was in the hospital about two weeks with bronchial pneumonia and this so-called influenza. That was the so-called Spanish influenza that was epidemic at that time. ‘Epidemic’ means generally prevalent disease, one that was common at that time. I recall Miss Hill personally very well. Prior to the time she got sick,

like all the nurses she was working and I didn't pay much attention to any of them, just talked to them—she was working all right. She was a very good nurse. There was nothing at all abnormal or unusual about her that I noticed. The conditions under which the nurses were working in October, 1918, just prior to Miss Hill's coming down with the influenza—we had the hospital full of these patients and we were all working over time. I myself worked thirty-six hours without a stop."

The Adjutant General's Office (A. G. O.) report further corroborates appellee (R. 65).

**A. G. O.—Degree of Disability Inadmissible.**

(NOTE: The statement on page 64 of the record, as to the degree of disability (A. G. O.) is clearly inadmissible and entitled to no weight whatsoever.)

See:

*Demeter v. United States* (App.D.C.), 66 Fed.(2d) 188;  
*United States v. White* (C.C.A. 9), 77 Fed.(2d) 757;  
*United States v. Stephens* (C.C.A. 9), 73 Fed.(2d) 695.

**Appellee's condition on January 1, 1919 (the date the jury found total permanent disability).**

The record shows that appellee did little or no duty after her illness in the Army Hospital and prior to her discharge (See R. 30-31).

Concerning her physical condition on or about January 1, 1919 (date of jury's verdict) appellee testified (R. 30-31):



“Then I had orders to come back to the States. When I came back to the States I landed at Hoboken. I didn’t go back on duty then. I wasn’t able to do duty. I was in bed all the way home on the boat, and when I arrived in Hoboken I was sent to—it was the Army Hospital at that time, but it was the old Polyclinic Hospital. I don’t remember what number—I believe, Army Hospital No. 4.

“I stayed there a few days. I wasn’t able to do duty, and I stayed there only a few days when I was sent to the Hotel Albert. At that time the Hotel Albert was the headquarters for overseas nurses. In other words, the Government was using it for a barracks for the nurses. I wasn’t on duty at all at the Hotel Albert. I spent my time in bed there. I left the army—I left New York the latter part of January of that year. I was sick in bed when I was notified to go down to get my traveling orders, and I stood in line with 300 other nurses to get my traveling—I was not given an examination at the time I left the Hotel Albert to go to my home. I didn’t see a doctor. If he was a doctor I didn’t know it. The man that gave me my traveling orders, he didn’t—he didn’t appear to be a doctor. When I left I left the Hotel Albert for home the latter part of January. I was discharged from the army February 3, 1919. I was in the army during the time I was on the way home and after I got home.”

**Appellee’s condition upon arriving home from the Army (January 16, 1919).**

In this respect appellee testified (R. 31):

“After I got back to Little Rock I rested for awhile. I didn’t feel good at all when I went to Little

Rock, and, of course, I rested for awhile and I was examined by Dr. Kirby and Dr. McGill. This was along the 20th of January when I was examined in St. Luke's Hospital. I arrived back in Little Rock on the 16th, but I had been home a few days before I had this examination. I went there for this examination because I was sick. They were the doctors that I had worked under before I went away. I had a rise of temperature every day. I had a very severe cough, and my heart was pounding every time I did any exercise of any kind, and I had these weak spells at any time I tried to go up and down the steps very much, and I would almost collapse. In fact, I had to be helped up the steps to the X-ray rooms in St. Luke's Hospital at the time that my chest was X-rayed. That examination was prior to my discharge. It was around the 20th of January and my discharge was February 3rd.

Dr. Kirby and Dr. McGill treated me for my chest. They treated me also for my stomach which was upset. They prescribed something for my stomach. Dr. Kirby gave me several different prescriptions. Dr. Kirby is now dead. He passed away in 1922. He gave me a prescription for my cough."

**Appellee's physical condition immediately after her discharge from the Army.**

In this respect appellee testified (R. 32):

"After that I tried to work and follow my occupation as a nurse. I tried to work—I registered for duty. It must have been two or three months after I had been home when I registered for duty, and for light cases—not night work. I worked in Little Rock on short cases. I don't believe I was

ever able to continue one case that lasted longer than three or four days, because I was weak. I couldn't go up and down the steps without resting. My heart pounded and I coughed. The doctors advised me to go to a dry climate for my health, which I did. I stayed around Little Rock before I went West from the time that I arrived home in January until around the 1st of November of that same year, 1919. There is no way to say correctly how much I worked during that interval from January or February up until the time I left in November of 1919—how much I actually worked, putting in time, working on the job for which I was paid. I worked very little. I worked three or four days at a time. I didn't work enough to pay my expenses at any time. It wouldn't amount to a half or third of the time. I wasn't registered for duty half of the time—I didn't work one-third of the time while I was in Little Rock because my temperature was never normal during that summer. I only registered for duty half of the time, that means I could work if a call came in, that is what it would mean if I was registered. After I had been home for two or three months is when I registered. My name would be off the register at different times until I left in November, 1919. When I went on a case I would take it off. It might not be put back on for—for instance, if some friend should call me on duty, not call me through the registry, my name being on the register didn't mean an awful lot. Any time I wanted a call from the registry I would call up and register. After I had once placed my name on the nurses registry, then every time I had gotten a job I would have to wait and finish the job before I could be registered again . . . for call. My name would be there but it wouldn't be for call—on call. In other

words, until I notified them that I had finished a job they wouldn't expect to call me. When I was on call I was available for duty. I was on call very little of the time that summer, I couldn't say how much. I was available to go out on a case from the time I registered, which was two or three months after I came back, until I left in November 1919. I wasn't on call one-third of the time, I don't believe. Of that one-third of the time that I was on call, I worked very little during that summer. I couldn't say just how much I worked, but I worked very little. I didn't work enough to pay my room and board, I know that much."

Also (R. 35):

"Going back to the time of my discharge, I spoke of having certain symptoms. I said I had pleurisy. I had pleurisy from the time I had pneumonia while I was in Liverpool. The left part of my chest is where I had these pleurisy pains. The pleurisy pain was in the left (illustrating). Sharp pain in my left shoulder any time from exertion. I am indicating the lower part of my back, the left side (indicating), is where I had the most trouble with pleurisy pains. The sharp pain in my left shoulder, that was different. Any time from exertion it was in my left shoulder. The first time I noticed that was the time I collapsed on the steps when I walked out to the big gate in Liverpool. I still have those pains. I have a sharp pain in my shoulder now, yes. I have the pleurisy pains occasionally. Concerning how frequently I would have these pleurisy pains from the time I had them in England in 1918 up to the present—any time from exertion; going up and down the steps; anything that would cause shortness of breath. I am

speaking both of the pleurisy pains and the pain in my shoulder; the pleurisy pains and the sharp pain in the shoulder are both brought on from exertion, from walking up and down and going down the steps, especially if I try to hurry.

Going back to the time I was discharged, so far as bodily sensations are concerned, with particular reference to my health, I felt, well, at times I felt a little better than I did at other times, but I continued to catch cold very easily. I have a cold now. It has been that way throughout all these years.”

Appellee left her home and friends in Little Rock, Arkansas, for Tucson, Arizona, on account of her poor health.

She testified (R. 33-34):

“I left Little Rock on account of my health, cough and these continuous weak spells that I would have. I thought that I might find a climate that would be better for me. I went to Tucson. I came by way of El Paso but I didn't stay at El Paso at that time. I did not have any acquaintances or friends in El Paso. I did not have any friends or acquaintances in Tucson. I had never been there. I didn't know a soul in Tucson. I remained there—arrived there after the first of November, 1919, I stayed the latter part of February, 1920. While in Tucson I tried to work at different times but I had pleurisy something terrible in Tucson, and I coughed all night. And I would put my name on call and if I was called out on duty, I wouldn't work because I had no one to befriend me there, and I couldn't stand the work at all. I probably worked two weeks out of the four months; no longer than that.”

Getting no better in Tucson she went to El Paso, Texas, although not knowing a soul there.

The record (p. 34) shows:

“I left Tucson because I wasn't any better. I didn't seem to be any better there, so I decided I would go back to El Paso and try. I didn't have any friends at all in El Paso. At that time I didn't know a soul in El Paso.”

**Her physical condition while in El Paso.**

While trying to learn X-ray work in vocational training appellee testified (R. 34-35):

“I would have to stop to gasp for breath any time I tried to wind this table up. It was just a flat table; it was used for X-ray. When they used it for the fluoroscope we would have to wind a big lift to bring it straight up and down, in other words, it would have to be vertical. It was rather a heavy table. It would wind up like all X-ray tables. The effect of this winding of that table had on me personally was to make me very short of breath. I couldn't wind it up without resting two or three times during the time I was trying to wind it up, and of course that would delay everything and Dr. Cathcart didn't like me to wind the table up.”

**Appellee's present physical condition and its duration since November, 1918.**

Appellee testified (R. 36-37):

“I catch cold very easily, and I cough, and then it seems to get a little better and I continue to have these weak spells. Describing these weak spells, well, from any exertion like going up and down the stairs, work-

ing for a few hours at a time, all of a sudden I turn weak and sometimes I get over it in a short time. There have been times when I didn't get out of my bed for three weeks when I had one of these weak spells. Concerning how long these weak spells would last when they first started—the first one was in Liverpool, England. I didn't get entirely over it that day but I felt well enough. Speaking in reference to these weak spells that I have described and how frequently they have been from the time I had this initial attack in England—no certain time. It might be—if I am not doing anything, if I am in bed, why of course I don't have them, if I am resting most of the time. The frequency with which I would have them are—any time from over-exertion; any time from work. I couldn't tell you how many of these spells I have averaged a year since 1917 or 1918, but I would have them often—as often as I exert myself. Every time I have tried to work I would have to go off duty any time I happened to be on a hard case. It has been oftener than once a month; sometimes I would have them every day. When they start they do not always last the same. As I have said before, one time was three weeks. I was too weak to go to the bathroom. Concerning the colds and how long they have lasted—no certain time; some times it was better in a few days, and sometimes it has been months. I feel like I have the same cold or concurrent colds. I am catching cold all the time. I have never been entirely over that feeling of catching cold all the time—cough in the morning. I am always weak in the morning. I have had that all the time since 1918. I am short of breath all the time. Sometimes I feel a little better than other times. Compared with the way I felt at the time of the last trial in October I feel a little better

now than I did last summer. I was in bed nearly all last summer, but I felt a little better during the past month than I did last summer, but still, I have had the weak spells. I have had the pain in my shoulder and the shortness of breath, and at times it seems my heart has stopped entirely. I will jump up in the middle of the night and I will get up and gasp for breath, and I will believe my heart has stopped for a space of seconds. That happens any time. I go to bed unusually tired. Of course, I have that tired feeling every morning when I get up—so tired, and tired in my chest, that I can hardly breathe, and at times I have felt I couldn't go on any longer when I was on duty; but, of course, I would go on as long as I could."

#### **Appellee's industrial history since discharge.**

Appellee, a trained nurse by profession before the war, faced with the necessity of sustaining herself in honorable circumstances, attempted from time to time, occasional employment as a trained nurse. The record however is replete with examples of heroic attempts to be self-sustaining, which efforts were invariably doomed to failure on account of her extremely poor physical condition due to her heart condition and her tuberculosis—either one of which diseases standing alone would be amply sufficient to constitute total permanent disability since the date of her discharge from the army.

It is respectfully submitted that taking a fair view of her spotty and fragmentary industrial activity since her discharge, rational minds could not reasonably differ over our contention that her work was not continuous and did not amount to following continuously a substantially gain-



ful occupation. The work she did attempt was not substantially gainful for two reasons: first, the amount of money earned was not sufficient to enable her to sustain herself according to the average American standard of living, and, second and far more important, if such work—no matter how pecuniarily remunerative—aggravated either her serious heart condition or her tuberculosis, and hastened its progress, made it worse and shortened her life, then it wasn't substantially gainful—no matter if she had received \$1,000.00 a month, because money can't buy health—and good health after all is worth more than all the money in the world. We think the Government must have had just this in mind when it adopted the precise language of its definition of total permanent disability contained in the policy.

Concerning her industrial activities since her discharge appellee testified (R. 34):

“While in Little Rock out of the six or seven months, I was on call at the registry in Little Rock, after I came back, putting it all together I probably worked three or four weeks out of that six or seven months.”

and concerning her work in Tucson, appellee testified (R. 34):

“I probably worked two weeks out of the four months; no longer than that.”

and (at El Paso) (R. 34):

“While I was in El Paso I did X-ray work while I was there. This vocational training I did in 1921 with Dr. Cathcart. This is vocational training under

the Veterans Bureau of the Veterans Administration, it was the Public Health at that time—it was the Federal Board for vocational training. I was in vocational training six or seven months. The government gave me vocational training—they advised me that it would be shorter hours and that I might be able to do the work.

I didn't get along so well in X-ray work. I found it very interesting work and I like it very much but there was a part of the work that was entirely too heavy for me to do, such as winding up the X-ray tables for the fluoroscope, the old fashioned X-ray tables had to be used for the fluoroscope, and that was too heavy for me to do."

and again (R. 37):

"Getting back to my industrial history—I covered 1919 and 1920. In 1919 I was in Little Rock; in 1920 I was between Tucson and El Paso. Then in 1921 I was also in El Paso. I left El Paso in 1922. In 1921 I had the vocational training. I didn't try to nurse, unless it was a couple of days at one time. The latter part of the year I worked two or three days during the latter part of 1921 as a nurse, but I had the vocational training at the beginning of the year. At that time work was plentiful. It was always plentiful; they were always calling for nurses. Nurses were scarce and work was plentiful.

In 1922 I went to Globe, and took a position in Globe, Arizona, I left El Paso because I was always looking for an easier job, something that I could do. I wasn't able to do the work in El Paso, and the nurses' registry in El Paso sent me to Globe, Arizona  
\* \* \* was supposed to be an easy position. I worked

there six weeks or two months, I would say. I quit that job because I couldn't stand the work. It wasn't hard work but I was short of breath and I coughed all the time, and I had this severe pain in my left shoulder and pleurisy, and also the pain in the right knee that has bothered me. I first had the pain in my right knee in 1922 when Dr. Kirby removed my tonsils in 1919. Dr. Kirby removed my tonsils in June or July, it was in the summer. The pain didn't go out of my knee when he took out my tonsils. You see, I had a rise of temperature all that summer. It would be a hundred and a hundred and six-tenths all that morning, and he treated me and advised me to have them taken out. I didn't feel any different after than I did before. I had the pain in my knee and sometimes, when I got weak, at first I had to hold onto the bannister. After I was in this hospital six weeks in Globe I rested for a while, and I took a position in the Inspiration Hospital in Miami. I worked at the hospital in Miami three or four weeks. I quit because I couldn't stand the work. During the balance of 1922 I rested a little while and went to Kingman and I took a position. I couldn't stand the work there. In Kingman I was in a general hospital. I left there in November, 1922, and went back to Phoenix, and I had a severe cold. I worked in Kingman two months \* \* \* October and November \* \* \* I mean September and October \* \* \* I left that job because I couldn't stand the work. I didn't feel any different on that job than I had on previous jobs. I had the same symptoms. I had a severe cough. After that I went to Phoenix. I had a severe cold when I got to Phoenix and had a high temperature, and I went to bed \* \* \* still in 1922. The balance of 1922 I didn't do anything. I stayed in bed and rested and Dr. Tuthill in Phoenix

treated me. In 1923—the first of January 1923 I started to work for Dr. Wheeler at the Indian Sanitarium \* \* \* that was a government job. Dr. Wheeler was a government doctor at the time in the Indian Service. I worked in the Indian Sanitarium until the latter part of July (1923) \* \* \* I went to work the 1st of January, and I was there until the latter part of July; but I didn't work all the time. I had a two weeks vacation, and I was sick at different times. I was in the Indian Sanitarium several months. I didn't get along very well with my duties there in the sanitarium. I didn't have bedside nursing to do. I had dispensary work, and I would work a couple of hours in the mornings, and sometimes that would be all the work I would have to do; but I wasn't able to hold the job at all. I was weak and tired. I was weak and tired, I was too weak and tired to get out of bed some mornings, and I worked there every day I could work while I was there. I quit the job in July on the advice of Dr. Wheeler. He advised me to take an extended rest. I wasn't Civil Service there. I was temporary. A temporary appointee. My salary on that job was about \$80.00 a month, I believe. That included my room and board. I don't remember what they deducted for room and board. The salary was supposed to be so much a year and so much deducted for my room and board. That was in July, 1923 I quit the Indian Sanitarium. The balance of that year I rested until the latter part of October, I believe it was, when I went to work in Hayden, Arizona \* \* \* That is the Dr. Wheeler whose deposition is on file here \* \* \* I worked in the Smelter Hospital in Hayden—I was there until April the next year, 1924. I was doing very light work there. Two or three weeks after I went there we didn't have a patient in the

hospital. I had to answer the telephone, and remove a cinder from a man's eye, or dress a finger, or do something like that, and receive the doctor's calls. That was my work for two or three weeks, and after I went there we had a few patients during the winter—a couple or three bed patients during the winter. When I wasn't working there and didn't have any particular duties to perform I rested in bed any time I had nothing else to do. This was permitted by my employers. They understood that I was to rest when I wasn't working. I had a bed in the hospital when I rested, and I could hear the telephone ring and the door bell ring and I could get up and answer, and go back to bed. I left that job because I couldn't stand the work any longer. I wasn't able to get out of bed—pleurisy and shortness of breath—that was April, 1924, I quit there.

The balance of 1924—I didn't work that summer. I went back east and spent the summer with my people there, back at Little Rock. That is not the first time that I had been back to Little Rock since I left there in 1919. I was back there every year during that time. They sent for me every year. Some time during the year I would spend two or three weeks back there. During the summer I had taken the Civil Service examination for the position at the Indian School hospital in Phoenix and the latter part of September I went back to Phoenix to the Indian School Hospital. I was not given a thorough physical examination in connection with that Civil Service Job, just a routine—asked questions. The Veterans Bureau had examined me in the spring of 1924—Dr. Fred Holmes. In the winter—it might have been in the winter of 1924, I believe it was—I held that job in the Indian School from the latter part of Sep-

tember until February. That is from September 1924, to February 1925. Well, the work—I didn't get along very well on that job. There again I had a bed. My room joined the girls' ward. It was a regular school hospital—school children were my patients and my room joined the girls' ward, and there again I had a cold. I had a telephone in one room; I could rest when I wasn't working, and answer the calls, which I did, and managed to get by as best I could until February. I quit in February because I couldn't stand the work any longer. I had pleurisy and this weakness, this shortness of breath, Dr. Wheeler, the government doctor in the Indian service, treated me while I worked at the Indian Sanitarium. No government doctor treated me while I was at the Indian school. The balance of 1925—I didn't do anything that summer. In the fall of 1925 I did a couple of private cases, short cases, when I felt like going out on duty. At times I had my name registered at the registry in Phoenix during this time. Concerning the method of registering at the registry: I registered at the registry. I went up there and told them I am a nurse and available for duty, and they registered my name. When I say on call I mean they have my name on the registry and somebody, we will say, comes in and asks for a nurse, and my name is there and they send me out on a case. The registry has a place to slip my name back to one side. I still belong on the registry, but I won't be on call. Suppose I take a case and am on the case for three or four days. Then I go off of it—I don't notify the registry until I am ready to go back on duty. If I am on a couple of days and go off, the registry wouldn't know anything about it for months. The registry keeps my name to one side until I notify them I am ready for duty again.

The balance of 1926 after I left the Indian School, I did some private duty nursing. During 1926 I registered for private duty nursing like the short cases. I did some private duty nursing. I was never able to take care of a case that was very hard, and worked only a few days at a time without rest. I have never worked a week straight at any time without rest. I never stayed on a case more than a week—not a week. I have never worked on a case more than a week. Sometimes, one day I wouldn't be able to go on duty next morning, wouldn't be able to get out of bed. Nurses were scarce during that time. There were a lot of calls for nurses. If I were to put all the days together when I did private nursing in 1926, it probably would not amount to four or five weeks during the year. I didn't work very much during 1927. I was sick in bed part of the time, and part of the time I was up. I felt a little better at times, and some private duty; never enough to pay my expenses at any time. In the winter of 1928 I was in bed practically all winter with a woman taking care of me. In 1928 I didn't work from Christmas, 1927, until April I believe it was, 1928, because I was sick in bed all that winter. The balance of 1928 I would take a short case occasionally. If I were to put all the days together I worked, it would be about the same as I had been working before that time. I would work a few days at a time and sometimes I would rest, and sometimes I was able to take care of myself, and I was ill, and then again I wasn't able to take care of myself. I worked when I felt like it and I couldn't say positively how many days I worked.

In 1929 I was sick in bed all winter—the winter of 1928 and '29—the beginning of 1929. I didn't work from January until the spring again. I was in bed

most of the time from the fall of 1928 to the spring of 1929 of that winter. The balance of 1929 I had a few short private cases, worked when I felt that I could. I did not work for any copper company hospital, either in 1929 or 1929."

And again (R. 44):

"If I were to put all the days together that I worked in 1928 doing private nursing, I couldn't say how many days I worked, approximately. Probably around six—four or six weeks, probably. I couldn't say for sure if that would be correct. But the longest period I ever worked in a stretch during 1929—I have never worked a week at any one time without relief since 1918 while ill with pleurisy and pneumonia overseas. I have never worked a week at any one time without relief. I had one or two private cases during 1930. I was in Phoenix all this time. After I came out with this patient to Los Angeles I went back to Phoenix immediately. I had my name on the registry at this time. I had belonged to the registry all that time. I had a couple of private duty nursing cases in the first part of 1930. I was sent by the nurses' registry to Superior, Arizona—sent by Dr. Swackhammer. If I were to take all the days together, putting all those days of private duty nursing together, up to the time I went to Superior—during 1930, I didn't work very much; probably two or three weeks. I started in to work at Superior the first of September, 1930, and I stayed there until the first of February, 1931. My duties on that job were general nursing—I did the buying of the groceries for the hospital—'phone orders. It was a very small hospital. We didn't have a patient in the hospital one time for six weeks, just



a small mining hospital. When I was supposed to be on duty there I spent my time—I had a bed in the hospital where I rested all the time. I could answer the telephone and the door bell, and it was opposite the dressing room door, and whenever a patient came in to have a finger dressed or have a cinder removed from the eye, I could get up and do that and go back and lie down, and I spent most of my time lying down. The Magna Copper Company owned the hospital. Concerning how I got along on that job as far as my health was concerned—how I felt, I always felt weak and tired and so tired in my chest that I could hardly get out of bed. At times I felt I couldn't go on any longer, but due to the fact that at times we didn't have a patient in the hospital, made it possible for me to stay on duty. And my knees gave me quite a lot of trouble that winter too. Dr. Swackhammer treated the rheumatic pain I had in my knee. It was treated by Dr. Swackhammer while I was there. During the rainy season it was quite severe and Dr. Swackhammer treated me. That is the same pain in the knee that I described as having in 1919. I left that job because I couldn't stand the work any longer. I couldn't get out of bed in the morning. I quit there in February, 1931. The balance of 1931 I rested. I came to Los Angeles—I came to San Fernando, California—that same year, 1931; that is a government hospital out there, at San Fernando. I was a patient in that hospital about eight months. I left there in November of the same year, 1931. They didn't give me any treatments, they just had me rest. I was in the T.B. ward there. I left San Fernando Hospital in November, 1931. I haven't done anything in the way of work since then."

There is, of course, abundant evidence in the record corroborating appellee, but bearing in mind the primary rule of evidence that one witness who is entitled to credit is sufficient to prove a fact (to the sole and exclusive satisfaction of the jury) we will not quote the same here.

**Appellee's hospital record.**

Besides the Army Red Cross Hospital at Liverpool, England, in 1918, appellee has been hospitalized or examined as follows:

St. Lukes Hospital, 1919 (Drs. Kirby and McGuire) (Examinations and treatment) (R. 84).

U. S. Public Health (Tuberculosis) Hospital, Ft. Bayard, New Mexico (3 months-1920) (R. 46).

U. S. Veterans (Tubercular) Hospital, San Fernando, California (8 months-1931) (R. 45).

Besides being treated by numerous private physicians.

**Appellee's Medical Evidence.**

The first doctor who treated appellee was Dr. (Major) Julian M. Wolfsohn, her commanding officer overseas, who treated her in November, 1918, at Liverpool, England. His testimony concerning his treatment of her we have already set forth above.

Dr. Wolfsohn again examined her in his office in San Francisco in 1935. Concerning her condition then, and the connection between her present illness and that of 1918, he testified by deposition (R. 67-68):

“The next time I saw her after that was May 16, 1935, in my office. I examined her at that time. At that time when I examined her I took the history of the

interim first. I recalled her at that time. She was a very personable young woman and I remembered her. I took this history of the interim from the time she left the hospital until the time she came to my office. Then I made a mental and physical examination also. I found that the important things were that in her chest, the upper left part of her chest, especially below and over the percussion note was high pitched as compared with the right and that the breath sounds were rather harshened. I also found that the heart was somewhat dilated, the point of maximum impulse was outside of the nipple line with the patient sitting up and systolic murmurs were heard at the apex. Also her blood pressure was 158 over 96, which is a marked increase. Her pulse rate was rather fast, 82. There was some vasomotor disturbances noted and she had particularly cold hands which were not moist. That is, I should think, the main body of the findings. As a result of that examination my diagnosis was—that she had a chronic pulmonary condition which was the result of the infection which I had treated before, in 1918. Concerning any connection between the condition found from the examination in 1935, and the condition found from the infection in 1918, the bronchial trouble in 1918 was in the same part of the chest and the history of the interim gave definite connection between the two. I am familiar with the duties of nurses. Basing my opinion on the condition found in 1935, and concerning the effect upon Miss Hill's health on her following her vocation as a nurse, as to whether or not it would be injurious to her health, I would say that in so far as the breath sounds were harshened and roughened in this area and high pitched percussion notes were noted over this particular area, I believe the local condition not com-

pletely healed and any physical labor she might do would be injurious to her health.”

Dr. Kirby and Dr. McGill are the first two doctors who treated appellee at St. Luke’s Hospital, Little Rock, after her discharge from the Army. Dr. Kirby died in 1922 (R. 32).

In his deposition, Dr. McGill testified (R. 84-85):

“Before the war she worked in St. Luke’s Hospital as a nurse while I was working with that institution, two or three years. I observed her physical condition as I worked at the same hospital. She was a graduate nurse. Her physical condition when I knew her at that time was good. She was in good health, she was affable, agreeable and efficient as a nurse during that time. She was a successful nurse. I saw her after she returned from the war about January or February, 1919. On that occasion she came back to the hospital and consulted one of our staff members, Dr. Kirby, for the purpose of diagnosis and treatment. I had occasion to examine her at that time. We made a physical examination and the findings were rales of upper lobes of the lungs, a large heart with mitral regurgitation, otherwise known as mitral insufficiency which to an average man is a large and leaky heart. The examination revealed tubercle bacilli, a positive tubercle bacilli existed. We frequently examined hearts. A condition known as parenchymal, mottling and annular shadows—that’s X-ray, and it means that there are spots on the lungs, silisolid, and annular means produced by tuberculosis. Such a condition existed in her case. I made the examination of her chest. I found—that’s what we were talking about—that was a chest examination. Her pulse was

rapid, she had evening temperature, evening fever, fast pulse, low blood pressure. She had a cough. She had a lack of physical endurance. I made a laboratory examination of her sputum—it was a microscopic examination. It revealed tuberculosis. The presence of tubercular bacilli in the sputum is one of the best signs of active tuberculosis. I would call that active tuberculosis—pulmonary. I did not make any other findings at that time. I don't recall what her blood pressure was at that time. It was low, it has always been low. My diagnosis then, in 1919, of her condition, was pulmonary tuberculosis, active, myocarditis, and mitral regurgitation. My prognosis at that time was bad."

(In view of counsels' abandonment of their Assignments of Errors No. III, IV and V, we will not quote counsels' objection and the trial court's ruling found on pages 85-88 of the record.)

(Witness continuing):

"From my finding as to the condition of her heart, I would say that it was of a permanent character. From my examination of her heart, it was damaged to such an extent that her condition would not improve and from which she would not ultimately recover. From my examination of her tubercular condition that existed and whether I would consider it permanent or temporary—well, the heart condition would be considered permanent, however she might get arrest of tuberculosis. I don't remember that I advised her as to her physical condition at that time. She wasn't my patient but I examined her for Dr. Kirby. Advice was probably left to him. However, she was one of our favorite nurses and her case was

discussed at a meeting, or maybe more than a meeting, of our Hospital Staff and it was the opinion of all of us that she should go to a higher climate and that she shouldn't attempt to do anything. She was not able to do the work of a nurse at that time. The treatment that was prescribed for her—rest was considered the most important thing for the heart and the tuberculosis too; change of climate and diet for tubercular condition. I made a record of my examination that I made of her at that time. I have not that record now. I do not know where it is. I may have furnished the Veterans Administration with the record of that examination. I gave some of those records to somebody. I don't recall how long Miss Hill was under my care at that time. She must have been around there several weeks. After she left the hospital she went West—it must have been El Paso. I don't recall when she left Little Rock. It was in the same year. I would say she went in the winter or early spring. I do not recall the exact date I examined her in Little Rock after her discharge from the Army—my impression is that it was just a few days. I recall testifying in this case once before. I stated in my former examination that I examined her about the first or second week in February of 1919. I think she attempted to do some nursing at the Hospital in Little Rock after she came back from the war and before going West and she couldn't do it. She was examined and found to be dangerous to have in a Hospital even if she could have worked. I don't think she tried to nurse anywhere else other than at the hospital, and her orders given were not to nurse after her condition was found out.

Then I examined her subsequent to 1919. That examination was made in 1921. She had been away

and she returned back to Little Rock from El Paso. When she returned that time I examined her with X-ray and made the physical examination. I found—about what my findings were at the previous examination. Little or no change. I don't remember that I examined her sputum at that time, but I decided that she was still active and one of the ways of determining whether tuberculosis is active or not is the finding of tubercular bacilli in the sputum. I took an X-ray of her chest in 1921. The X-ray revealed about the same as at the first examination. I had occasion to examine Miss Hill subsequent to 1921. That was on January 6, 1936. After my examination of Miss Hill in 1921 I advised further rest and her return to El Paso and further treatment out there for tuberculosis. I advised her to continue the treatment she had been having. She was not able to do any work at that time. In my practice I have had occasion to know the requirements of a job of nursing. She could not do that job in the manner satisfactory to a well qualified nurse. She was qualified by training to do nurse work as required by our hospital. She was not physically fit to do that character of nursing after her return from the war. When I examined her in 1936 I found on that examination—the lungs had moist rales of both upper lobes with consolidated area in both lungs. The heart was very large and there was a mitral regurgitation. She had a cough, evening rise of temperature, and a sputum containing tubercle bacilli. The pulse was rapid and the blood pressure was low, being 90/70. No improvement in lungs or heart since last examination. From my examination of her at that time I would say that her condition had not improved over her condition at the time I first examined her after her return from the Army. I examined her on

three occasions. Her condition had not improved over the previous conditions at former examinations. Her condition from the examination made in 1936 had not advanced in severity from her condition in 1921—they were just about the same. There wasn't much difference. It was just about as severe. The trip out here caused her to have fever. Any exertion caused her to have fever. The mitral murmur was not more pronounced at the time of the last examination than before—but it has always been so pronounced that even a novice could hear it. I took an X-ray of Miss Hill in 1936. I do not have one of the X-rays made at former examinations. Bearing in mind Miss Hill's physical condition as I observed it at the time she went into the Army and my physical examination that I made of her after she came out of the service, in my opinion her tuberculosis began while she was in the Army. In my opinion at the time I saw her in February of 1919 her tuberculosis had existed at that time for a few months. From my association with Miss Hill prior to the time of her entry into the service, she did not complain of any heart disorder. From my examination of her condition after her return from military service, and of my knowledge of her condition before she entered into the service, I would say that her heart condition became serious while she was in the service. With her heart condition such as she suffered, she could not carry on physical activities and work as a nurse. If she tried to work with a condition like she had, the result would be fatal. She was advised by me that if she attempted to work as a nurse it would perhaps be fatal to her or result in the serious impairment of her health—her condition was explained to her so she would understand why it was necessary to take a rest for months and months,



years and years, if necessary. She was acquainted with the danger of attempting to work. The effect contemplated work as a nurse or physical activity would have upon her heart condition if she had attempted it—it would make it worse.

Bearing in mind Miss Hill's physical condition and her condition upon my examinations of her, in my opinion the possibilities of Miss Hill being cured of her physical ailments, if ever—the heart diseases were absolutely incurable and on account of these diseases it was very doubtful if the tuberculosis would ever be arrested. I don't think she could ever become cured of her tubercular condition—I didn't think it then and I don't think it now."

And on cross-examination, Dr. McGill testified (R. 93-97):

"In my first examination I said I found rales of the lungs, tubercle bacilli in the sputum and a large heart. I got the impression that she suffered from mitral insufficiency and mitral regurgitation from the big heart. Her heart was so big the valves would not meet. I think the heart was enlarged so that those valves would not close. Possibly the same thing that caused the tuberculosis caused the heart to enlarge, that is, probably the flu she had while in the service. Large hearts, tubercular conditions and valvular diseased hearts come from infections, and the infection she had was flu. My X-ray showed trouble with the valves of the heart. The X-ray showed a big heart, but those leaks are easily detected by putting the ear up against the chest, or a stethoscope. I made that kind of an examination."

At this stage of the trial the following proceedings took place:

“Q. In most instances, Doctor, isn't nature's effort to overcome valvular heart trouble successful? In other words, wouldn't it become compensated?

A. It hasn't become compensated in Miss Hill's case.

Q. That isn't the question I'm asking you, Doctor. In most cases isn't nature's effort to compensate that nature of trouble successful?

A. It is successful in that small percentage of cases in which the heart disease improves.

Q. What does it mean to compensate a heart?

A. It means that the heart get strong enough that it can beat with such terrific force that it can still force the blood through the body even though there is a flowing back or regurgitation of blood with each beat of the heart. Persons who have slight leaks of the heart may get compensation sufficient to lead a fairly active life by being careful not to over-eat or over-exert.

Q. Isn't it true that many men or women afflicted by heart trouble such as you found in your first examination of this patient, go on through life and live their allotted time and die of some other disease?

A. No.

Q. That isn't true?

A. No, not with a person with as bad and as big a leak as this person had.

Q. What do you mean by big leak?

A. So much of the blood is flowing back that every beat of the heart couldn't be overcome by compensation, and the lady wasn't able to work.

Q. That's not responsive. The condition that you observed at that time was such, you say, that she couldn't do nursing?

A. That is right.

Q. But nursing is rather a strenuous task?

A. It is.

Q. It requires heavy lifting and loss of sleep?

A. Absolutely.

Q. Are you familiar with any other calling a person of her education could follow without danger to her condition and her heart?

A. No.

Q. This patient, in your conception, has gotten considerably worse since you testified before?

A. No, she is about like she was.

Q. I mean your conception of her condition since you first examined her.

A. I have had from 1919 to 1936—a period of seventeen years. If you have had somebody under observation for seventeen years, and no improvement in heart or lungs, it will be reasonably certain that there will never be.

Q. I'm talking about the first time you examined her. Your conclusion now is, according to your testimony, that she was at that time in a great deal worse condition than you thought at that time she was.

A. Yes, subsequent advance has shown us that her condition is even worse than we thought it was.

Q. You reached that conclusion, yet during this seventeen year period you examined her twice, once in 1921 and once in 1936?

A. Yes.

Q. You say you advised rest for her?

A. Yes, rest is the most important thing.

Q. What did her physician, Dr. Kirby, advise?

A. That was his advice, too. In fact, that was the advice of the whole staff, including Runyon, Kirby, myself, Carruthers and others.

Q. Now, at the time you first examined her you say that she had tubercular bacilli in the sputum?

A. Yes.

Q. You got that by microscopic examination?

A. Yes, that's right.

Q. Does that indicate an active tubercular condition?

A. Yes.

Q. Would you say that a patient would have active tuberculosis when the microscope reveals bacilli independent, or whether or not the patient had fever?

A. No.

Q. Isn't the presence of some fever the symptom of active tuberculosis?

A. It is.

Q. Isn't tuberculosis in its incipient stage curable?

A. It is arrestable in many cases. However, that was incurable because of her heart condition.

Q. Now, Doctor, you had not known anything about her condition between 1921 and 1936?

A. Except what she told me.

Q. So far as you know during that period the tuberculosis may have become arrested and the heart compensated?

A. The tuberculosis may have become arrested, in fact it might have been arrested two or three times in that period, but the heart has never been compensated because it's just like it was. The blood pressure is too low for it to be a compensated heart. The blood pressure is so low that the patient could not do anything."

Dr. A. D. Long examined and treated appellee in El Paso, Texas in November, 1920, for her heart and lungs. He testified (R. 102):

“I recall what I found—I recall that she had very mild tuberculosis and heart lesion. It would endanger her recovery more, and her chance of recovering her health if she worked or engaged in any kind of strenuous work such as nursing, and it would probably make her heart condition worse to engage in a strenuous exercise.”

And on cross-examination Dr. Long testified by deposition (R. 103):

“At the time I made examination of the plaintiff in this case, in my opinion she was suffering from the moderately advanced stage of tuberculosis.”

\* \* \* \* \*

Q. You stated her heart condition was a permanent condition?

A. Yes.”

And on redirect examination (R. 104):

“At the time of the examination Miss Hill was suffering from active tuberculosis—that was my opinion. It was not an arrested case. The condition of her lungs would have something to do with her heart condition. It would complicate it—it would be worse than either one would be by itself.”

Dr. W. S. Sharp testified by deposition that he examined the appellee in February or March of 1919 (Counsel on both sides agree this was February or March 1920). He testified (R. 106):

“On my examination of Miss Hill at that time I found—well, the occasion of that examination was that I secured Miss Hill to attend this Mr. Ralph Parker, who was a personal friend of mine and while nursing this case Miss Hill had a complete breakdown and I was called to see her at the hospital. I examined her and found that she had an arrested case of tuberculosis, (quiescent). The situation seemed to be that this condition was aggravated by her work and then she also had a heart condition that contributed to her breakdown materially. Mr. Parker was suffering from double pneumonia. Miss Hill was also suffering from heart ailment. She had, as I recall it, myocarditis and a heart condition aortitis, an inflammatory condition of the aorta. After I examined Miss Hill I advised her to take an extended rest. She was unable to continue with her work in this particular case.”

And on cross-examination Dr. Sharp testified (R. 107):

“My examination of the plaintiff was in 1919 (1920). I had an electro-cardiograph. She had myocarditis. It is a diseased condition of the heart muscle which results in weakening of the heart muscles.”

And again on cross-examination (R. 109):

“Q. What effect, Doctor, would the industrial activities of the plaintiff Frances Hill, that is carrying on her occupation, have upon the tuberculosis condition?”

A. I would say it would aggravate it.

Q. And what effect would her industrial activity have upon the heart condition?

A. My answer would be the same.”

Dr. A. J. Wheeler, a Government physician specializing in tuberculosis and now employed at the Government's Albuquerque Indian Sanatorium, testified (R. 120-121):

“ I know the plaintiff, Frances Hill. I first became acquainted with her about 1923 in Phoenix, Arizona. At that time I was connected with the Phoenix Indian Sanatorium. She was a nurse on my staff. She was employed by me on my staff at the Sanatorium from May, 1923, to July, 1923. I examined her lungs during the time she was employed by me. The symptoms which led to my examining her lungs at that time—she felt tired, coughed, had slight expectoration, was nervous, weak, had some pain in her chest, with a slight afternoon temperature. Examination showed moist rales in the upper lobes. My diagnosis as to her physical condition at that time based on my physical examination, was pulmonary tuberculosis. The upper lobes of her lungs were involved with pulmonary tuberculosis. The condition of her tuberculosis at that time—I thought it was active. I do not recall how many examinations I made on Miss Hill during the time she attempted to work for me. Her employment was terminated—I advised her to stop work. My advice to her to stop working was based upon my knowledge of her lung condition. The kind of treatment it was advisable for a person in her condition to take was—well, rest until the activity and the disease should disappear.”

Dr. D. S. Duncan, also a physician in the Government Indian Service, in a deposition taken by the Government but read in evidence by plaintiff, testified that he made a routine examination of Miss Hill when she went to work for the Indian School (R. 128):

“We hired her knowing her history and knowing that there was a possibility of her having tuberculosis, and on the basis of the report from the Veterans Bureau—Dr. Fred Holmes, who is a tuberculosis specialist, having made same, and being a specialist, could not dispute his word, and in addition, the examination that I made.”

And on cross-examination Dr. Duncan testified (R. 128-129):

“ I knew she had tuberculosis when at the sanatorium—it was common knowledge that she had been diagnosed tubercular. When she came to me she needed work. Mr. Brown and I talked it over before we hired her. There was some question as to her health, and whether she was able to work, and we took that into consideration but thought that with the help of the Indians and due to the fact that she had only to supervise, she could handle it. Her record was good while employed at the sanatorium and she was a competent nurse. She really wanted to work. I understand she needed the work and being an ex-army nurse we felt we should give her a chance, if she could manage it. I figured the duties were not very strenuous and she could do them, because it was mainly supervision.”

Dr. Harry Cohn, now head of the tuberculosis department of the Los Angeles City Health Department and one of the outstanding tuberculosis experts of the United States as shown by his qualifications, testified as follows (R. 132-134):

“I had occasion to examine Miss Hill, the plaintiff in this case. I first examined her in December, 1929.



She came to the office stating that she was taken ill on her way from Phoenix; came in for an examination. I examined her at that time. She consulted me merely as a physician for treatment. Upon my examination I found at that time she was suffering from an active tuberculosis. She also had evidence of heart damage; she had a pleurisy at the base of the left lung. Her tuberculosis at that time was classified as moderately advanced. Lung tuberculosis is generally classified three ways: as a minimal, or early; moderately advanced and advanced. Her case was moderately advanced. Concerning her heart condition she had evidence of a widening of the large tube which leads the blood from the heart, and an enlargement of the heart, and the inability of the heart muscle itself to respond in a satisfactory way to any sort of exercise or effort. Her condition indicated a serious heart condition. Her condition of tuberculosis was serious at the time I examined her in 1929. I examined her again in April, 1935, last year, after this suit was filed here. When I examined her in 1935—at that time she had an active tuberculosis involving the upper lobe, which was approximately the upper third of the left lung. She had, of course, the same pleurisy that was noted previously and she had approximately the same heart condition, although it appeared to be somewhat worse at that time. I examined her again the latter part of 1935. In October, I believe. The condition of her health then—well, her lung tuberculosis had quieted down somewhat. In other words, the findings which indicated an active tuberculosis on other examinations were not present at that time, so the disease was marked “quiescent.” Her heart condition and her inability to respond to exercise was present at that time as it had been on all examinations. I don’t

recall the date I next saw her, but I have seen her several times this year. Her condition at the present time—I believe the tuberculosis is quiescent. That is, it is not definitely active. It is one of those border line. That does not mean she is cured.”

On pages 134 to 135 of the record, Dr. Cohn gives an exceptionally clear picture of the disease of tuberculosis from the layman’s standpoint.

Regarding the relation of Miss Hill’s heart condition to her tuberculosis, Dr. Cohn testified (R. 136):

“In Miss Hill’s case, the significance her heart condition has so far as tuberculosis is concerned—and vice versa—well, her heart condition has this particular effect upon her lung condition: the circulation, of course, in a heart which is not an adequate pump, is not so good as it would be in a pump that is competent. The tendency is for the blood to collect in the dependent portions of the lung and produce some congestion there. On the other hand, her tuberculosis, with a production of poisons, does injure the heart just as it injures other parts of the body, so that there is produced a more or less vicious circle, one acting to the detriment of the other. In other words, having this heart condition, she would have much less of a chance to make progress in a tubercular condition than if she didn’t have a heart condition. The reverse of that is true so far as the heart condition is concerned, that it is aggravated by the tubercular condition. Her lung ventilation is rather handicapped by her lung condition. In other words, there is that shortness of breath in a pair of lungs which should be resting.”

After hearing the hypothetical question, Dr. Cohn testified (R. 137-141):

“\* \* \* in my opinion Miss Hill’s tubercular condition began or started or had its inception following shortly after the attack of flu and pneumonia while in service. I believe it has been testified to that this was in October and November, 1918, in Liverpool, England. Bearing in mind those facts that it was testified Miss Hill was discharged from the army on February 3, and returned to her home at Little Rock, Arkansas around January 20, 1919; that at that time she was examined by Dr. McGill and found to have a positive sputum with X-ray of the lungs showing infiltration and other definite evidence of tuberculosis; that she also had a mitral regurgitation—damage to the mitral valves of the heart. Assuming those facts and the other facts that I am familiar with in this case, in my opinion the degree of advancement of her tuberculosis at the time she came home from the army and was examined by Dr. McGill, and he found positive sputum, which means sputum is stained with a dye and put under a microscope, and the presence of tubercular bacilli is shown up through the glass, that is positive sputum, and that is one of the definitely unquestionable evidences of tuberculosis—assuming that she had that positive sputum and the X-ray showed definite infiltration in various parts of the lung, and also she was complaining of pleurisy pains in the lower part of the lung. Assuming those findings in connection with the hospitalization and the trouble she had had with the flu and bronchial pneumonia in France, I would say that the degree of advancement in the tuberculosis in the spring of 1919, particularly on or before February 3, 1919, was moderately advanced.

If she was moderately advanced, and assuming those facts of the findings to be true,—and assuming that I am entitled to take into consideration the subsequent history and present condition from my own examinations—looking back on the case in retrospect, the chances or probabilities of her being cured or completely arrested of tuberculosis in 1919, February 3, even had she taken the best of care and gone to a sanatorium and done everything possible—it is my opinion from those facts, that it would not be good. I mean by that, that the probabilities were very much against her becoming a case of arrested tuberculosis even if she had taken the best of care.

At the present time I do not think there is a reasonable probability of her getting over this tuberculosis and becoming what is known as an arrested case. Concerning the fibroid type of tuberculosis which has been testified to in various findings that these doctors on examination found—nature is attempting to throw up scar tissue and wall off this tuberculosis. In other words, there are two types of tuberculosis: the soft spreading type, and the type that scars up as it goes along. We may have a tubercle here and scar tissue—tubercle forming here (indicating) and an extension along the other side and more scar tissue forming. That is what they call a fibroid type of tuberculosis. I believe from the history of this case as shown by the evidence in the court room here, that the tuberculosis was incipient or beginning in the fall of 1918 after she had the bronchial pneumonia, and by February, 1919, it had become moderately advanced. Concerning the test you put a person through to ascertain and determine whether or not they have attained a case of arrested tuberculosis, where it has previously

been active—the patient should have no symptoms referable to their disease. They should have no tubercle bacilli in their sputum. You take X-ray films, and the X-ray films should show that the spots are at least stationary or healing and the patient should demonstrate ability to take a prescribed amount of exercise daily over a specified period of time. The first examination I made of Miss Hill, I found tubercle bacilli in the sputum. I have not been able to find it since then. It does not mean a man does not have tuberculosis just because there was no tubercle bacilli in the sputum. If there are tubercle bacilli in the sputum, it means there is an ulceration somewhere discharging tubercle bacilli in the bronchial tubes. A man may have extensive tuberculosis without tubercle bacilli in the sputum. If you find positive sputum, you do not have to go further. I examined her heart—I had measured her heart. I have listened to it with a stethoscope. I have had her take bending exercises and straightening up exercises, testing the heart response, taking her pulse rate before and after, and after rest, and have taken her blood pressure on many occasions. So far as the measurements are concerned, her heart is not normal in size. In that respect I found the left side of the heart, that is that portion of the heart which pumps the blood into this large blood vessel supplying the entire body, called the aorta is enlarged. That is what we call an enlargement of the left ventricle. Now, the aorta, this tube (indicating on chart) is also wider than normal, and that is the aortitis. Her heart, that is, the measurement across this way (indicating on chart) the transverse measurement, is approximately an inch larger than normal. The last time I examined her heart was today. I used a steel measuring stick in

order to be able to see it under the X-ray. I had her in front of the fluoroscope. When a person is in front of a fluoroscope it is possible to see the action of the heart and aorta. You visualize the action of the heart in front of the fluoroscope. In other words, you see the heart beat and pump. There is nothing abnormal with her heart as I observed it except the rate of the heart is much faster than the normal rate. In other words, the normal rate for a woman of her age is approximately 78 to 82, while her heart rate is always above 94. The rhythm, instead of being a normal rhythm, is inclined to be irregular. Her pulsations are not normal. The significance that that has in connection with heart disease—well, it shows there is some damage to the heart muscle. In other words the heart muscle, instead of being truly muscular tissue, is in part scar tissue. Basing my opinion upon the evidence in this case, not taking into consideration the diagnosis or conclusions of other doctors, in my opinion she was suffering from a serious and incurable ailment for which rest was the prescribed treatment, and which would have been aggravated by work of any kind, at the time of her discharge February 3, 1919. That disease was a degenerative heart disease and she was suffering from a moderately advanced lung tuberculosis; chronic pleurisy.”

And on cross-examination Dr. Cohn testified (R. 144):

“Regarding this damage to the heart that I found in 1929, which condition still exists, and whether her heart condition was easily detected—all you have to do is to take one glance at it under the fluoroscope and know that it is a badly damaged heart. Suppose I had not the advantage of a fluoroscope—that I just made a stethoscope examination—and whether or not

I would say it was easily detected—well, that is again a question of the time you picked the heart up. There are probably some times when the heart is relatively quiet and other times when the heart would be quite stormy. That would depend upon the time the doctor put the stethoscope on the heart.”

Dr. Chas. O. Young, who examined appellee in 1935 and 1936, testifying as a heart expert after hearing the hypothetical question, testified (R. 182-183):

“\* \* \* plaintiff’s heart condition was the cause and had its inception at the time when plaintiff had influenza in 1918. In my opinion assuming that early in 1919 when plaintiff was examined by Doctors Kirby and McGill she had blueness of the lips and shortness of breath, plaintiff had a damaged heart at that time from which condition there was no probability of a cure. Assuming the testimony I heard in the court room to be true, and basing my opinion upon the findings of the physicians that had examined plaintiff in 1919 until date of trial, plaintiff was suffering from a serious and incurable ailment for which rest is the prescribed treatment and which would be aggravated by work of any kind at the time of her discharge on February 3, 1919, I would classify the heart condition from which plaintiff was suffering at that time as myocarditis and mitral insufficiency.”

Dr. Samuel E. Welfield, an internist, after detailing his examination of Miss Hill, testified (R. 186-187):

“Her heart: The apex beat was in the fifth left interspace about three to three and a half inches from the costal margin, or the middle of the chest. Upon

auscultation, listening to the heart with a stethoscope, there was a marked mitral murmur heard with evidence of mitral regurgitation.

The aorta was tremendously enlarged. I took a ruler and measured the aorta and its transverse diameter, and it was well over four inches, which would be approximately ten and a half centimeters.

The mitral heart, or the left lower border of the heart, was away over to the left side and beating quite rapidly. The beat was quite rapid. It is possible in the fluoroscope to see the heart beat. You can see the heart contract and relax and contract under the fluoroscope. The fluoroscope is where they place the patient between the X-ray tube and the examiner, and you can see the shadows reflected on the screen, the same as you do on a moving picture. Now the diagnosis: Chronic laryngitis. That is, the larynx and the voice box and the tissue in that voice box is inflamed, which produces a huskiness or raspiness of the voice when a patient speaks. Chronic pulmonary tuberculosis, apparently quiescent at this time; chronic aortitis, chronic myocarditis, mitral regurgitation. Evidently the crepitation in the knees is due to a mild arthritis. As to what causes arthritis—usually any infectious disease will precipitate the incipiency of arthritis. Tuberculosis would cause arthritis. (The doctor then stepped to the blackboard and drew a diagram illustrating the various valves of the heart, and the aereation of the blood from the heart to the lungs.)”

Dr. Welfield heard the plaintiff's evidence also the depositions containing Dr. McGill's findings in 1919 and the other doctors' findings and testified as a medical expert from these hypothetical facts.



That this is an approved form of procedure is now established.

See

*United States v. Linde*, (C. C. A. 10), 71 Fed.(2d) 925, 926;

*Putney v. United States*, (D. C. Colo.), 4 Fed. Supp. 376, 378.

See also:

*United States v. Sessin*, 84 Fed.(2d) 667;

*United States v. Woltman*, (App. D. C.), 57 Fed.(2d) 418.

Testifying as a medical expert and basing his expert opinion on these hypothetical facts, Dr. Welfield testified (R. 191-193):

“I have sat here through the testimony for the past 2 days. Assuming the testimony I have heard to be true, taking the facts I have heard as constituting the so-called history of the case, and assuming that the findings of the doctors—Dr. McGill, Dr. Sharp and Dr. Long, and these various other doctors who examined her and treated her from time to time, and also the findings of these Government doctors as manifested by these Government reports I have heard—but not taking into consideration the diagnosis, or the conclusions of the doctors, in my opinion Miss Hill was suffering from chronic myocarditis, mitral regurgitation and chronic pulmonary tuberculosis at the time of her discharge, February 3, 1919.

If she had taken care of herself, meaning by that absolute rest over a period of years, in my opinion there would not have been very much change in her condition than exists today. I think that she is worse

today, so far as her heart condition is concerned, than she was in 1919. As to how much worse—well, the heart disease is a progressive condition. She embarrassed that condition of that heart by attempting to work at various times, and with a very serious effect on the heart. The work that she attempted to do, required of a nurse, sometimes requires strenuous work. And any strenuous work would have a deleterious effect upon her heart, or any heart condition.

I heard her testimony to the effect that she had, what she described as, an easy job working in the hospital for the copper company, where she would lie down most of the time and answer the telephone, and about all the duties that she had for a time would be to bind up a lacerated finger or take a cinder out of the eye, and at times they would go six weeks at a time without a patient in the hospital. That was very light duty and that would not have very much effect upon her heart—that particular position. Other positions, where she was required to stand on her feet or be on her feet for any length of time, would have a deleterious effect on her heart. I think there is no doubt there was a marked aggravation of her heart condition, that the work she did since February, 1919, aggravated the condition and made her worse.

I have testified that I think her heart is worse now than it was in 1919, judging from the evidence here. And the work she did, in my opinion, aggravated and made it worse. All heart conditions are progressive, being progressively worse in this respect: That the pathology increases as the person grows older. The more care that that person takes of himself, the longer their expectancy. The longer a heart case—the better a heart case takes care of himself, the longer they

will live. That applies to all heart conditions. It is an infallible opinion among the doctors that rest in many instances—60 per cent or more—enters into the cure of any heart disease.”

and again (R. 196) :

“From the testimony here and the facts in this case that I have heard here, in my opinion the beginning stage or incipency of her tuberculosis was following her acute infection in 1918 of Spanish influenza and bronchial pneumonia. I am bearing in mind the testimony of Dr. Wolfsohn. I know Dr. Wolfsohn personally very well.

Her heart condition was in the incipency or beginning stage—it is my opinion that her valvular trouble began at the same time due to the infection of Spanish flu. I have an opinion as to whether or not her heart condition had progressed to the point where it was considered of a severe degree at the time of her discharge from the Army on February 3, 1919. My opinion is that it had progressed to a rather severe degree.”

Dr. Welfield further testified (R. 197) :

“There is no medicine to cure tuberculosis—the only chance is to give them good food and nourish the body, food and rest; sunshine and air.

Concerning His Honor asking me about Miss Hill sitting at a desk in a hospital or receiving ward, for instance, in a sedentary occupation, and concerning whether the mental worry and mental activity in connection with such an occupation have any tendency to increase the pulse rate, for instance, or aggravate either the heart or tubercular condition—mental work

uses up sometimes as much reserve force of the heart as physical work. On the other hand there are other kinds of mental work that do not do that at all. These Government reports show that these doctors did not find objective findings of tuberculosis. Their diagnosis we will say, at times was arrested tuberculosis. If, during that period and while trying to carry on an occupation of nurse nursing patients, Miss Hill had recurring colds, was coughing and felt tired and exhausted, and on several of the jobs, as she described on the stand here, she felt so tired she could not get out of bed in the morning—under those conditions she could not obtain arrestment of tuberculosis. In other words, if her tuberculosis had been arrested she would not show those symptoms.”

There is, of course, an abundance of other testimony on behalf of plaintiff, most of it lay evidence, but we think the foregoing a sufficient answer to the question:

**“IS THERE ANY SUBSTANTIAL EVIDENCE OF APPELLEE’S TOTAL PERMANENT DISABILITY PRIOR TO HER DISCHARGE FROM THE ARMY?”**

Having in mind the facts of the case we now turn to the law applicable thereto.

Analytically speaking,—and bearing in mind that no longer (since *United States v. Stephens*, supra, and *United States v. White*, supra) is it permissible to ask a doctor whether a person is totally and permanently disabled or whether he is able to follow continuously a gainful occupation—were we to “break down” the definition of total permanent disability, we find:

1. That a work record in and of itself is not conclusive, but merely evidence for the jury’s consider-

ation; likewise vocational training (see particularly *U. S. v. Albano* (C.C.A. 9), 63 Fed.(2d) 677; *U. S. v. Nickel* (C.C.A. 8), 70 Fed.(2d) 873; *Law v. U. S.* (D. C. Mont.), 290 Fed. 972.

2. That if work is intermittent or spasmodic due to poor health, it is not "continuous" under the definition, and

3. If work aggravates the disease or physical condition and makes it worse or shortens life, it is not substantially gainful.

Since what work the appellee did was at the risk of her health and life, her work record does not bar her from recovery under her **Insurance Contract.**

In the leading case on what constitutes permanent total disability and the interpretation of the definition (Treasurer's Decision 20 W. R. dated March 9, 1918) the Supreme Court in *Lumbra v. United States*, 290 U. S. 551, 561; 54 S. Ct. 272, 78 L. Ed. 492 (at page 275, 54 S. Ct.) said:

"The war risk contract unqualifiedly insures against 'total permanent disability.' The occasion, source, or cause of petitioner's illness is therefore immaterial. His injuries, exposure, and illness before the lapse of the policy and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. March 9, 1918, in pursuance of the authorization contained in the War Risk Insurance Act, the director of the Bureau ruled (T. D. 20 W. R.): 'Any impairment of mind or body which renders it impossible for the disabled person to follow continu-

ously any substantially gainful occupation shall be deemed \* \* \* to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.'

The phrase 'total permanent disability' is to be construed reasonably and having regard to the circumstances of each case. As the insurance authorized does not extend to total temporary or partial permanent disability, the tests appropriate for the determination of either need not be ascertained. The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules of formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others.'

And again, on page 276, the Supreme Court said:

"Total disability does not mean helplessness or complete disability, but it includes more than that which is partial. 'Permanent disability' means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life."

And further, on page 276, the Supreme Court said:

“It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability.”

In *United States v. Flippence* (C.C.A. 10), 72 Fed.(2d) 611, at page 613, the Court said:

“On the other hand, it is settled by high authority, that if one, unable to work in the sense that he is afflicted with a disease where rest is indicated nevertheless works ‘when really unable and at the risk of endangering his health or life’ such work does not bar recovery if the proof shows the insured to be otherwise entitled to recover. (Citing cases) If, during the life of his policy, an insured is afflicted with a disease which may be cured by a period of rest, but if, instead of following that course, he works until the disease reaches the incurable stage after his policy lapses, he cannot recover; not, however, because barred by his work record, but because at the time his policy lapsed his disease was curable and his disability temporary. *On the other hand, if, as here, the malady is incurable before lapse, and if it is of a nature where complete rest is necessary to prolong life, then work done thereafter endangers his life and does not necessarily bar recovery.*” (Italics ours.)

In *United States v. Brown* (C.C.A. 10), 72 Fed.(2d) 608, at page 610, the Court said:

“Employment may be of such a nature and duration that it conclusively refutes any idea of total and permanent disability. On the other hand, a person who is incapacitated to work, impelled by necessity

and aided by a strong will, may engage in work that aggravates his condition and hastens his death. (Citing cases)

*One who has a serious and incurable ailment for which rest is the recognized treatment and which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life.*" (Italics ours.)

In *United States v. Sorrow* (C.C.A. 5), 67 Fed.(2d) 372, the Court said:

"One is totally disabled when he is not, without injury to his health, able to make his living by work."

In the case of *United States v. William J. Higbee* (C.C.A. 10), 72 Fed.(2d) 773, the Court laid down the well recognized rule, which we submit is applicable to this case, as follows:

"He has worked since then but it apparently was done in a commendable effort to earn a living. Total and permanent disability does not require that one be an invalid or confined to his bed. He may work spasmodically with frequent interruptions, caused by his physical condition, and still be totally and permanently disabled. (*Nicolay v. United States*, 51 Fed. (2d) 170; *United States v. Rye*, 70 Fed.(2d) 150.) And work done under pressure of necessity, when health requires rest, does not necessarily disprove disability. The jury may well have found that insured was totally and permanently disabled; that his condition required rest and inactivity, but that the



inescapable necessity to earn a livelihood for himself and his family spurred him to work with injury and aggravation of his physical condition. If so, he is not barred from recovering upon his contract. (Citing cases) Neither the fact that he received vocational training nor his long delay in instituting this action is conclusive against his right to recover. Both are circumstances for consideration of the jury under appropriate instructions of the court.”

We believe that there can be no question but that there was substantial evidence that appellee worked when really unable and at the risk of endangering her health or life. See *Lumbra v. United States*, 290 U. S. 551, 54 S. Ct. 273, 78 L. Ed. 492.

The Supreme Court in deciding the *Lumbra* case, and in its opinion after making the statement quoted above cites several cases. The first case cited by the Supreme Court in the note is that of *United States v. Phillips*, in which the Court said:

“Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so. The mere fact that insured did work for Smith-McCord-Townsend Dry Goods Company and also for Montgomery Ward & Company does not necessarily prove that he could follow continuously a gainful occupation. The evidence shows that this work was

carried on under great difficulty and was a light class of work." See *United States v. Phillips* (C.C.A. 8), 44 Fed.(2d) 689.

The Supreme Court likewise cites, on page 499, of the *Lumbra* case, the case of *United States v. Godfrey*. In the *Godfrey* case, it appeared that the veteran was constantly on a payroll from October 14, 1919, until February 3, 1927, earning thirty to thirty-five dollars a week, and yet the verdict of the jury was accepted and the judgment affirmed, the Circuit Court for the First Circuit, saying:

"The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. \* \* \* To hold him remediless because he tried, manfully, to earn a living for his family and himself, instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."

*United States v. Godfrey* (C.C.A. 1), 47 Fed.(2d).  
126.

The next case cited in the footnote on page 499 of the *Lumbra* case is that of *Carter v. United States*, wherein Judge Parker stated the principle of law that we believe to be applicable in this case, which is:

"To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that one who following the advice of his physician refrains from such work, and lives, is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a

determination upon the facts in each case whether the man \* \* \* was able to continuously pursue a substantially gainful occupation.”

*Carter v. United States* (C.C.A. 4), 49 Fed.(2d) 221.

The next case cited in the footnote to the *Lumbra* case, on page 499, is the case of *United States v. Lawson* decided by this Court (50 Fed.(2d) 646). In the *Lawson* case the veteran went to work on May 15, 1920, at a salary of \$1100 per annum, plus a bonus of \$240, and worked for this for one year, and then after doing some other work, on April 1, 1921, he was given a probatory appointment as forest ranger at a salary of \$1220 per year, plus an annual bonus of \$240, serving in this capacity until August 31, 1923. On September 1, 1923, he was appointed as a forest clerk at a basis salary of \$1100 per year, in which capacity he served until April 15, 1924. The latter part of September, 1924, he became Postmaster at Spencer, Idaho, his annual pay being \$1100, and he held that job at that salary continuously until the time of the trial in 1930, and this Court per Mr. Circuit Judge Sawtelle, said:

“It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work, proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances, when they should not work at all. When they do that they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein con-

vinces us that the plaintiff worked when he was physically unable to do so, and that, but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered.”

*United States v. Lawson* (C.C.A. 9), 50 Fed.(2d) 646, at 651.

We believe that the case at bar is a much stronger case than the *Lawson* case in favor of the veteran, for the reason that *Lawson* was still holding his position as postmaster at the time of the trial and at the time the appeal was decided.

In a case decided by this Court, that of *United States v. Burleyson*, 64 Fed.(2d) 868, it appeared that the veteran had worked continuously since service and was alive at the time of the trial, and this Court sustained the verdict, saying:

“On this diagnosis the experts disagree, nor is it entirely clear from their testimony that it was detrimental to the veteran’s health to work as he did in the event that he was suffering from Buerger’s disease. However, the weight of this evidence was for the jury. Their verdict is to the effect that for the veteran to work continuously would impair his health. In view of this situation, no matter how unsatisfactory the condition of the record, we must hold that there was substantial evidence to go to the jury upon the question of the total and permanent disability of

the veteran before the lapse of his war risk insurance policy.”

*United States v. Burleyson*, 64 Fed.(2d) 868 at 872.

In a case which involved a heart disability it appeared that the veteran had earned \$15,000. (*United States v. Francis* (C.C.A. 9), 64 Fed.(2d) 865.) The verdict of the jury in behalf of the veteran was sustained upon the theory that it was for the jury to determine whether the work that he had done had been injurious to his life or health.

In summarizing Francis' work record, this Court per Mr. Circuit Judge Wilbur, said:

“It is claimed by the veteran that notwithstanding his long periods of work and substantial remuneration therefor, aggregating in all about \$15,000., he was ‘totally and permanently disabled’ during that whole period. Within the meaning of that phrase as defined by the Treasury Department regulations and by the decisions of the courts. This view was sustained by the jury under proper instructions from the court and the question is whether or not the court erred in denying the motion of the Government for directed verdict.

The testimony in favor of the veteran on the trial was directed to the proposition that although he did in fact work, and although he did so continuously for long periods of time, he was unable to do so because he thereby imperiled his health and shortened his life by reason of the excessive load put upon his heart, whose functions had been seriously impaired by the wound and resulting pus infection.”

*United States v. Francis*, 64 Fed.(2d) 865.

**OUR ANSWER TO APPELLANT'S CONTENTIONS.**

As heretofore pointed out, we cannot agree that opposing counsel's statement of the facts is either fair or accurate. To us it sounds more like counsel's argument to the jury than a statement on appeal where counsel are bound by the findings of the jury on conflicting evidence.

**APPELLEE'S "LONG" DELAY IN FILING CLAIM.**

Appellee filed claim for insurance benefits on June 18, 1931, while a patient at the San Fernando (California) Veterans Hospital. In this respect she testified (R. 47):

“I didn't pay premiums on my insurance after July of 1919, because I wasn't able to work to keep it up. I put in a claim for this insurance—filed the claim—on June 18, 1931, for insurance benefits. The first time that I heard I had any rights and had a right to assert a claim for this insurance was after I came to San Fernando. It was some time during the spring I would say, in May. I don't remember what day or what month it was, but I was admitted in the San Fernando hospital in April, and it was some time after I was admitted there that the Legion Commander called on me and he learned of my condition and he advised me about the insurance. I didn't know it. I didn't put in a claim prior to that time because I didn't know I could—that is the first time I knew I had a right to assert a claim.”

This explanation evidently was satisfactory to the jury, whose duty, after all, it was to weigh the testimony.

See

*Gilmore v. United States* (C.C.A. 5), 93 Fed.(2d)  
774;

*United States v. Higbee* (C.C.A. 10), 72 Fed.(2d)  
773.

The cases cited by counsel in their brief, we submit, are not in point, on the question of total permanent disability, for as this Court has recently held, each war risk insurance case must stand on its own peculiar facts.

See

*United States v. Thompson* (C.C.A. 9), 92 Fed.  
(2d) 137, 139.

Furthermore, "All legitimate doubts as to whether appellee was totally permanently disabled must be resolved in appellee's favor."

See:

*United States v. Sligh* (C.C.A. 9), 31 Fed.(2d)  
737;

*United States v. Balance* (D. C. App.), 59 Fed.(2d)  
1040;

*McNally v. United States* (C.C.A. 4), 52 Fed.(2d)  
440;

*Putney v. United States* (D. C. Colo.), 4 Fed. Supp.  
376.

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**APPELLEE'S GALL BLADDER OPERATION IN 1927.**

Counsel on page 18 of their brief attempt to make much of the fact that appellee had a gall bladder operation in 1927 and took ether as a general anesthetic.

This was not inconsistent with her claim of total permanent disability and did not prove that she did not have a serious heart and pulmonary condition at that time. Counsel for the Government cross-examined two doctors on this point; namely, Dr. Cohn (R. 167-168) and Dr. Welfield (R. 199-200), both of whom testified that ether is a heart stimulant and not a heart depressant, also that ether would not hurt appellee's tubercular lungs. Both doctors testified that general anesthetics are oftentimes given patients suffering from either active tuberculosis or serious heart disease or both (R. 167-168; R. 199-200). That in that kind of an operation, blood pressure and kidney conditions are more important.

In the record (R. 268-271) counsel have photostated facsimiles of appellee's application for Civil Service examination. They also set forth various other documents signed by appellee which probably were intended to impeach her testimony.

These matters merely went to the weight of her testimony.

See:

*La Marche v. United States* (C.C.A. 9), 28 Fed. (2d) 828;

*United States v. Albano* (C.C.A. 9), 63 Fed.(2d) 677.

In the *La Marche* case this Court held (Par. 4, Syl.):

“In action on war risk insurance policy, plaintiff's false claim of injury after expiration of policy for purpose of having his employer pay his hospital bills and expenses, and his certificate some time after ex-



piration of policy that his condition was same then as when policy lapsed, were immaterial, except so far as they might affect his credibility as a witness.”

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### CONCLUSION.

We realize this brief is somewhat protracted, but we felt the matter is of such importance to the appellee that it was incumbent upon us to urge every important point in her favor on this appeal.

Then again, in order to do justice to her cause and to answer the inquiry, “Is there *any* substantial evidence in the record to justify the jury’s verdict?” we felt it necessary to point out in the record that evidence—tested in the light of the leading cases on the subject—which in our humble opinion fully meet the legal requirements concerning what evidence is necessary to constitute total permanent disability.

Counsel for appellant attempts to lay great stress on the Government’s medical records which somewhat minimize appellee’s disabilities. But from an appellate standpoint, the most that can be claimed for the Government’s evidence is that it conflicts with appellee’s evidence. The jury having resolved that conflict in appellee’s favor, leaves nothing before an appellate court.

See

*United States v. Burleyson* (C.C.A. 9), 64 Fed.(2d) 868, and other cases cited above.

It must be borne in mind that all of the Government's Veterans Administration reports were introduced by the Government—not by appellee.

From a medical standpoint, however, the medical evidence is readily reconcilable. Take appellee's heart condition, for instance. Dr. J. J. Klein, a Government doctor employed at the Veterans Hospital at San Fernando, was appellee's ward doctor a large part of the seven months she was hospitalized there. He gave her the entrance examination and at first found no heart disease (R. 246), although he admitted he later found it. In fact, her heart was so bad he didn't dare give her any exercise. In this respect he testified (R. 246):

“The graduated exercise, as a rule, continues until we are satisfied in regard to making the diagnosis. In this case we had to give that up more on account of her heart than anything else.”

Concerning a tuberculosis expert not finding a serious heart disease, Dr. Klein testified (R. 248):

“I gave them a general physical examination but I didn't happen to catch anything on the heart at that time. I am presuming that it was there from the subsequent results. I dare say it is possible that a person can have a heart murmur and a chest man, a specialist on tuberculosis, looking only for tuberculosis, can very easily pass up that murmur.”

We think this completely explains just how it was possible for the Government doctors who examined appellee for the Government to “slip up” and miss finding the heart condition, although it was there all the time. It

is a matter of common knowledge that some doctors are very careful in their examination while others are not. The jury apparently accepted and had a right to accept this explanation.

Regarding her tuberculosis Dr. Klein testified (R. 247) :

“Generally the Veterans Hospital at San Fernando follows the classification of tuberculosis laid down by the National Tuberculosis Association, and one of the rules of the National Tuberculosis Association is that where one remains quiescent or inactive for a period of six months a change of diagnosis to arrested tuberculosis is justified.

Although I observed her over six months I only gave her exercise for two or three days except the exercise she would get in going out on passes and leaves. I did not examine her immediately after she left when she went out on passes and leaves; I didn't think it was necessary. It is true that the rule of the National Tuberculosis League provides that before a diagnosis of arrested tuberculosis is justified, in addition to observing the patient for six months, the last two months of this six months the patient must have been given an hour's walking exercise twice daily, or its equivalent, and then if the patient shows no symptoms of tuberculosis, then and then only are you justified in making a diagnosis of arrested tuberculosis.”

Dr. Klein further testified (R. 248) :

“I recall telling Miss Hill when she complained to me of feeling tired that she would probably be tired for the rest of her life.”

The diagnostic standards of the National Tuberculosis Association, to which Dr. Klein referred, provide, under the "Schema for the Classification of Subsequent Observations" (page 29, Diagnostic Standards, Tenth Edition, 1935) as follows:

"II. Arrested

All constitutional symptoms absent; sputum, if any, microscopically negative for tubercle bacilli; X-ray findings compatible with a stationary or retrogressive lesion. These conditions shall have existed for a period of six months, during the last two of which the patient has been taking one hour's walking exercise twice daily or its equivalent."

In none of the Veterans Bureau examinations—not even San Fernando Hospital—did any of these Government doctors give her a six months' observation with two months' walking exercise.

Therefore, we submit this is a clear explanation of just how and why these various Government doctors were unable to find tuberculosis when they examined her—the answer, they didn't make the test—and said her tuberculosis was arrested when, in fact, they hadn't made the recognized and requisite test to determine if her tuberculosis was, in fact, arrested. Therefore, the unreliability of their examinations has been demonstrated. We believe it elementary that the jury had a right to accept this explanation, especially when these Government doctors' reports conflicted with the positive medical evidence of the doctors produced by appellee.

We think it significant that on the only job which can really be called employment, namely, for the Government

in its Indian Service, appellee soon broke down again and such employment was terminated (R. 123) on account of her physical condition.

In conclusion we submit there is ample evidence in the record to justify the jury's verdict and that the judgment of the lower court should be affirmed.

July 11th, 1938.

Respectfully submitted,

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*Attorney for Appellee.*

